Arkansas Law Review

Volume 72 | Number 4 Article 2

May 2020

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PANDORA'S CAKE

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Most of us are familiar with the spectre of Pandora's Box, the "present which seems valuable, but which in reality is a curse."[1] Robert Graves described Pandora as "the most beautiful [woman] ever created."[2] She was sent by Zeus as a gift to Epimetheus, who initially "respectfully" declined to marry her.[3] But chastened by the fate of his brother Prometheus, he changed his mind and wed a women who was "as foolish, mischievous, and idle as she was beautiful."[4] She opened a jar that she and her husband had been "warned . . . to keep closed in which"[5] Prometheus had "imprison[ed in it] all the Spites that might plague mankind: such as Old Age, Labour, Sickness, Insanity, Vice, and Passion. Out these flew in a cloud, stung Epimetheus and Pandora in every part of their bodies, and then attacked the race of mortals."[6]

What is generally less well known is that the jar was a wedding gift, which to my way of thinking makes Pandora's Box an appropriate proxy for the goals being pursued by the Colorado baker Jack Phillips.

Phillips describes himself as "a Christian who strives to honor God in all aspects of his life, including how he treats

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1. *Pandora's Box*, BREWER'S CONCISE PHRASE & FABLE (Betty Kirkpatrick ed. 2000).

2. ROBERT GRAVES, THE GREEK MYTHS: THE COMPLETE AND DEFINITIVE EDITION ¶ 39h (Penguin Books 2017) (1955). She is also described as "the All-gifted," given that "each of the gods gave her some power which was to bring about the ruin of man." *Pandora's Box*, *supra* note 1.

3. GRAVES, *supra* note 2, at ¶ 39.h.

4. *Id.* at ¶ 39.j.

5. *Id.*

6. *Id.*

people and runs his business."[7] He believes "[a]s core tenets of his faith . . . that marriage is a sacred union between one man and one woman, and that it represents the relationship of Jesus Christ and His Church."[8] He refuses, accordingly, to provide wedding cakes for same sex marriages. So when Charlie Craig and David Mullins visited his business as they planned their wedding reception, he "politely explained that he does not design wedding cakes for same-sex marriages, but emphasized . . . he was happy to make other items for them."[9]

Hesiod characterized the seeds of Pandora's Box as "the countless troubles" that might "roam among men."[10] In this instance, the foundations for countless troubles lie within two key Supreme Court precedents, *Frazee v. Illinois Department of Employment Security*,[11] and *United States v. Ballard*.[12] Neither factored in Jack Phillips' first and perhaps not last appearance before the Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[13] But both have substantial implications for the ongoing debate about whether it is either necessary or appropriate to grant religion-based exemptions to public accommodations laws.

Frazee makes it clear that individuals claiming the protection of the Free Exercise Clause need not be practicing members of a recognized sect in order to receive the Clause's protection.[14] Rather, they need only profess a "sincere belief

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7. Brief for Petitioners at 8, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Petitioner's Brief]. The argument posed by Phillips' concession that he would provide other products and services to Craig and Mullins was rejected in Elane Photography, LLC v. Willock, 309 P.3d 53, 62 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014) ("Elane Photography's willingness to offer some services to Willock does not cure its refusal to provide other services that it offered to the general public").

8. Petitioners Brief, *supra* note 7, at 9.

9. *Id.* at 10. At the time of the request same-sex marriage was not available in Colorado. Craig and Mullins were accordingly married in Massachusetts and were planning for a post-nuptial reception in Colorado. *See* Brief for Respondents Charlie Craig and David Mullins at 4, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Craig & Mullins Brief].

10. HESIOD, *Works and Days*, *in* THEOGONY AND WORKS AND DAYS 35, 40 (M.L. West trans., Oxford World's Classics ed. reprt. 2008.

11. 489 U.S. 829 (1989).

12. 322 U.S. 78 (1944).

13. 138 S. Ct. 1719 (2018).

14. *Frazee*, 489 U.S. at 829.

that religion require[s them] to refrain from the [conduct] in question."[15] *Ballard*, in turn, tells us that the "[f]reedom of thought" protected by the First Amendment "embraces the right to maintain theories of life and of death and the hereafter which are rank heresy to followers of the orthodox faiths."[16] It is accordingly not the province of the courts to judge "those teachings false," no matter how "incredible, if not preposterous [they might seem] to most people."[17] For to do so would mean that "little indeed would be left of religious freedom."[18] Rather, the sole question is whether the belief in question is sincerely held. "Heresy trials," the Court tells us in no uncertain terms, "are foreign to our Constitution."[19]

Pandora's Cake, if you will, lies in wait. What are the implications if, as was the case with Jack Phillips, the adherent seeking Free Exercise protection need not ascribe to the tenets or

15. *Id.* at 833. The decision was not cited by the Court, any of the parties, or amici in *Masterpiece Cakeshop*.

16. *Ballard*, 322 U.S. at 86. This case was also not cited by the Court and was discussed only in passing in the amicus briefs. *See, e.g.*, Brief of Billy Graham Evangelistic Association et al. as Amici Curiae in Support of Petitioners at 26, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (noting the *Ballard* holding that while "courts cannot inquire into [] an individual's asserted religious beliefs [to determine veracity], they can inquire as to whether the individual honestly and in good faith actually holds such beliefs"); Brief of the Foundation for Moral Law as Amici Curiae in Support of Petitioners at 16-17, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) ("The Colorado Civil Rights Commission and the CCA have neither the jurisdiction nor the competence to tell Phillips what does or does not constitute a substantial burden upon his religious beliefs. By so doing, they are acting in a manner that this Court prohibited in . . . *Ballard*.").

17. *Ballard*, 322 U.S. at 87. As Professor Koppelman notes, the problem is not simply whether one might be tempted to argue that a given religious belief is "obviously wrong" or "false." Andrew F. Koppelman, *Gay Rights, Religious Accommodations, and the Purpose of Antidiscrimination Law*, 88 S. CAL. L. REV 619, 626 (2015). It is also the extent to which such beliefs are "destructive" and "give transcendent sanction to discrimination and inequality." *Id.* His answer, consistent with *Ballard*, is to "deprive[] [them] of their cultural power." *Id.*

18. *Ballard*, 322 U.S. at 87.

19. *Id.* In a similar vein, status as a "religion" is not confined to recognized sects or creeds. Realizing that the Establishment Clause posed problems for a selective service regime that granted conscientious objector status only to members of groups like the Amish and Mennonites, the Court has fashioned an analogic definition of religion, characterizing it as "[a] sincere and meaningful belief which occupies in the life of its professor a place parallel to that filled by the God of those admittedly qualifying for the exemption." United States v. Seeger, 380 U.S. 163, 176 (1965).

be a practicing member of a recognized sect?[20] And what follows from the realization that that individual's beliefs, when sincerely held, are not subject to question? Do they deserve protection, even in the face of what Justice Antonin Scalia has characterized as a "valid and neutral law of general applicability"?[21] In particular, do we heed civil rights statutes protecting heretofore unfavored groups,[22] statutes that target conduct society deems inappropriate, perhaps even abhorrent? Or do we "forbid[] the government from coercing artistic expression contrary to conscience,"[23] no matter how idiosyncratic or preposterous others might find the religious beliefs in question? In short, should the individuals pursuing the sorts of claims advanced by Jack Phillips and his many *amici* be careful about what they wish for?

I. THE PROBLEM

As a threshold matter, it is important to recognize that *Masterpiece Cakeshop* did not actually decide anything of consequence. Yes, the Court issued an opinion. But no – as most commentators have recognized,[24] albeit not some members

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20. Jack Phillips averred that his beliefs were "derive[d] . . . from the first and second chapters of Genesis in the Bible, as well as other passages from the Bible . . . which describe[] marriage as a picture of Christ's relationship with the Church" and that "[t]he Bible . . . instructs me to 'flee' or run from sinful things, and in particular those relating to sexual morality." Petition for Writ of Certiorari at 274a-75a, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (Phillips Aff. ¶¶ 13, 16). His attorney in turn has confirmed that "Jack is not a member of a particular denomination." Email from Kristen Waggoner, Alliance Defending Freedom, to author (Aug. 20, 2018) (on file with author).

21. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring) (internal quotation mark omitted)).

22. The laws in question tend to be uniform in their articulation of the groups to be protected. *See, e.g.*, COLO. REV. STAT. § 24-34-601(2)(a) (2014) ("disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry"); OR. REV. STAT. § 659A.403(1) (2015) ("race, color, religion, sex, sexual orientation, national origin, marital status[,] or age").

23. Reply Brief for Petitioners at 2, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Reply Brief].

24. *See, e.g.*, Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) ("The case presented a legal conflict between LGBT rights and religious liberty. But the Court ducked the central questions raised by that conflict.").

of the Court[25] – it did not actually resolve any of the real issues presented in that case. Instead, it punted, holding only that given what were described as flaws in the decision-making process below, Jack Phillips was denied "neutral and respectful consideration" of his claims in ways that exhibited "a clear and impermissible hostility toward sincere religious beliefs."[26] So the no-decision decision generated what was in effect a remand, with "[t]he outcome . . . await[ing] further elaboration[s],"[27] giving all of the parties in this and similar cases additional bites at the cake.[28]

Three of my favorite things in matters constitutional are a book and a pair of cases. The book is Richard Kluger's magisterial *Simple Justice*,[29] the elegant and definitive study of the litigation that became collectively known as *Brown v. Board of Education of Topeka, Kansas*.[30] As I recently observed, *Brown* remains entitled to its place in the positive constitutional canon, but not because of what it tells us about the law that now applies to racial discrimination in the structure and delivery of K-12 education.[31] Rather, it merits the respect it has earned as a study about the nature and pursuit of justice, in particular, its role in realizing the transcendent ideal "that animated the American nation at its beginning . . . radiant [and] honored . . . the inherent equality of mankind."[32]

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25. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1740 (2018) ("I agree that the Colorado Civil Rights Commission . . . violated Jack Phillips' right to freely exercise his religion.") (Thomas, J., concurring).

26. *Id.* at 1729 (majority opinion).

27. *Id.* at 1732.

28. That was clearly the effect of the Kennedy opinion, albeit not one he articulated, stating only that "[t]he judgment of the Colorado Court of Appeals is reversed." *Id.* For verification, see Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018) ("remanded . for further consideration in light of *Masterpiece Cakeshop*"),aff'd, 441 P.3d 1203 (Wash. 2019), petition for cert. filed, 86 U.S.L.W. 3636 (U.S. Sept. 12, 2019) (No. 19-333); Klein v. Or. Bureau of Labor and Indus., 139 S. Ct. 2713, 2713 (2019) (same). A new and arguably "cleaner" case has in turn arrived at the Court's doorstep. *See* Petition for Writ of Certiorari, Klein v. Or. Bureau of Labor & Indus., 139 S. Ct. 2713 (2019) (No. 18-547) [hereinafter Klein Petition].

29. RICHARD KLUGER, SIMPLE JUSTICE THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

30. 347 U.S. 483 (1954).

31. Mark R. Killenbeck, *Constitutional Heresy?*, 62 ST. LOUIS U. L.J. 667 (2018).

32. KLUGER, *supra* note 30, at ix.

The cases are *Frazee* and *Ballard.* In *Frazee* the Supreme Court declared that William Frazee was entitled to claim an exemption from the "suitable work" requirement in the Illinois unemployment compensation statute when he refused to accept a position that would require him to work on Sunday. That was an issue, the state believed, because Frazee did "not claim that his refusal to work on Sunday is based on any tenet of a church or religious body."[33] He was simply "a Christian and as such he feels it wrong to work on Sunday."[34] This was insufficient because Illinois required that any "injunction against Sunday labor must be found in a tenet or dogma of an established religious sect."[35] The Supreme Court disagreed, unanimously "reject[ing] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[36] In effect, justice trumped a state's narrow vision of the law.

Ballard in turn arose when charges were brought against Edna and Donald Ballard for making "false and fraudulent representations, pretenses and promises," in particular that they had "the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments.'"[37] In their defense, the Ballards averred that they "'honestly and in good faith believe[d] those things.'"[38] The Court held that "the truth or verity of [their] religious doctrines or beliefs should [not] have been submitted to the jury,"[39] declaring that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[40] Conceding that "[t]he religious views espoused . . . might seem incredible, if not preposterous, to most people,"[41] the Court nevertheless emphasized that "if those doctrines are subject to

33. Frazee v. Dep't of Emp't Sec., 512 N.E.2d 789, 791 (Ill. App. Ct. 1987).

34. *Id.*

35. *Id.* at 792.

36. *Frazee*, 489 U.S. at 834.

37. United States v. Ballard, 322 U.S. 78, 79-80 (1943) (internal quotation marks omitted).

38. *See id.* at 81.

39. *Id.* at 86.

40. *Id.* (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) (internal quotation marks omitted)).

41. *Id.* at 87.

trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."[42]

What I would like to suggest is that there is a looming problem posed by the collision of notions of justice and sincerely held religious beliefs in the pairing of *Frazee* and *Ballard* with *Masterpiece Cakeshop*. Stripped to its essence, *Masterpiece Cakeshop* was an appeal for the sort of "simple justice" that *Brown* embodied. Could a state force a sincere believer to compromise her or his beliefs in the face of a "governmental [desire] to protect the rights and dignity of gay persons who are, or wish to be, married but face discrimination when they seek goods or services?"[43] Or should Jack Phillips—and presumably all individuals like him, persons with "deep religious faith whose beliefs guide [their] work"[44]—be entitled to an exemption from what are undeniably neutral laws, laws that apply to all citizens and forbid discrimination against certain classes of individuals?[45]

As indicated, the *Masterpiece Cakeshop* Court punted: it did not reach the merits of the two constitutional issues posed, free exercise and compelled speech. Rather, it held only that certain procedural defects below denied Jack Phillips "the neutral and respectful consideration of his claims in all the circumstances of the case."[46] In particular, it focused on religion, declaring that "[t]he [Colorado] Civil Rights Commission's treatment of [t]his case has some elements of a

42. *Ballard*, 322 U.S. at 87. On remand, the Court of Appeals summarily affirmed the convictions. Ballard v. United States, 152 F.2d 941 (9th Cir. 1945). The Supreme Court reversed, Ballard v. United States, 329 U.S. 187 (1946), holding that the systematic exclusion of women from the jury "deprive[d] the jury system of the broad base it was designed by Congress to have in our democratic society." *Id.* at 195. The indictment was dismissed, *id.* at 196, and there is no record that the government refiled the charges.

43. *Id.* at 1723.

44. Petitioners Brief, *supra* note 7, at 1.

45. Counsel for Phillips argued that the Colorado Anti-Discrimination Act, COLO. REV. STAT. ANN. § 24-34-601 (West 2014), was not in fact a neutral law, but was rather a "content based" restriction on free speech, given its "'operation' and effect." Reply Brief, *supra* note 24, at 20-21 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994)). I take no position on whether it is correct that the application of a statute that is facially neutral against a specific type of expression transforms the statute itself into a content-based measure.

46. *Id.* at 1729.

clear and impermissible hostility toward the sincere religious beliefs that motivated [Jack Phillips'] objection."[47]

My focus then is on that side of the *Masterpiece Cakeshop* coin. I will not explore and take no position on whether Jack Phillips is an artist who becomes "an active participant in the wedding celebration," and, as a result, has a right to refuse to facilitate it.[48] Nor do I wish to contemplate whether wedding cakes per se convey a message that can properly be attributed to the baker, speech that Jack Phillips was not obligated to promulgate.[49] My gut instinct tells me that wedding cakes alone say nothing about the individuals who created them, much less their views. I also doubt that bakers have any particular right to "participate" in the ceremony or subsequent reception, much less that their mere presence conveys a discernable message. The fact that Jack Phillips sometimes does so strikes me as irrelevant. He may well view himself as an "active participant" and may "sometimes stay[] and interact[] with the guests at the wedding."[50] But I doubt that these voluntary actions confer some sort of cognizable right to highjack the ceremony, transforming it from an expression of the celebrants' views into his own.

My sole focus is then on the Free Exercise claim, assuming it is one that the Court will eventually address directly and will, presumably, be tempted to support.[51] That said, complexities lurk. Custom invitations?[52] Flowers?[53] Videos of the ceremony?[54] The venue and associated services?[55] The free

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47. *Id.*

48. *Id.* at 1742 (Thomas, J., concurring).

49. *Id.* at 1743.

50. Masterpiece Cakeshop, 138 S. Ct. at 1742-43.

51. It is possible that the Court will be receptive to a religious-exemption claim. Professor Oleske, for example, characterized at least four members of the pre-Kavanaugh Court "[open] to the argument." *See* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, WIS. L. REV. (forthcoming 2019) (manuscript at 45), [https://perma.cc/T2BF-FSMT](Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch).

52. *See* Brush & Nib Studios, LC v. City of Phoenix, 247 Ariz. 269, [] (2019) ("custom wedding invitations, and the process of creating them, are protected by the First Amendment because they are pure speech").

53. *See* State of Washington v. Arlene's Flowers, Inc., 441 P.3d 1203, 1226 (2019) ("The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding.").

54. *See* Telescope Media Group v. Lucero, 936 F.3d 740, 751 (8th Cir. 2019) ("To be sure, producing a video requires several actions that, individually, might be mere

speech problems posed are myriad, conjuring up echoes of Justice Potter Stewart's inability to "further define the kinds of material . . . to be embraced . . . [b]ut I know it when I see it."[56]

I cheerfully decline to voyage into that realm. My sole focus, accordingly, is on the Free Exercise claim and I will to explore whether all parties to the case have considered the full implications of a possible rule that would, as Professors Thomas Berg and Douglas Laycock advocated, "protect the liberty of both sides."[57]

II. FREE EXERCISE?

The notion that the law should respect sincerely held religious beliefs is deeply appealing. There is something undeniably offensive about government "discriminat[ing] against individuals or groups because they hold religious views abhorrent to the authorities."[58] One prevailing myth about the founding is that the Puritans – having fled the persecution of an established church in England – instilled on these shores a commitment to religious liberty, believing that "God requireth not an uniformity of religion to be enacted and enforced in any civil state."[59] Nothing could be further from the truth. As Justice Thomas has noted, "[a]t least six States had established churches in 1789" and three "maintained local-rule establishments whereby the majority in each town could select

conduct . . . But what matters for our analysis is that these activities come together to produce finished videos that are 'medi[a] for the communication of ideas.'") (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952)).

55. *See* Gifford v. McCarthy, 137 A.D.3d 30, 42 (N.Y. S. Ct. [] 2016) ("reasonable observers would not perceive the . . . provision of a venue and services for a same-sex wedding ceremony as an endorsement of same-sex marriage").

56. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

57. Brief of Christian Legal Soc'y. et al. as Amici Curiae Supporting Petitioners at 11, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Berg & Laycock Brief].

58. Sherbert v. Varner, 374 U.S. 398, 402 (1963) (citing Fowler v. Rhode Island, 345 U.S. 67 (1953)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("[T]here are areas of conduct protected by the Free Exercise Clause . . . beyond the power of the State to control, even under regulations of general applicability.").

59. Roger Williams, The Bloody Tenent, Of Persecution for Cause of Conscience, in V The Founders Constitution at 48, 48 (Philip B. Kurland & Ralph Lerner eds. 1987).

the minister and religious denomination."[60] Having fled the establishment they disliked, the individuals who settled this nation were more than happy to set up an establishment that favored their own faith:

> When the Puritans fled from persecution in England, and planted themselves in America for the purpose of enjoying religious freedom, it was evidently the freedom of the church collectively which they sought – not liberty of conscience to individuals, but the liberty of the church to exercise, without restraint, all that power over the consciences of individuals, which they considered indispensible to preserve the purity of the church. – They were no more averse to a religious establishment, or the punishment of heresy, than those of the established church in England.[61]

That said, this is not the approach the Court has taken. Neither Congress, nor an individual state, may "establish" a church, that is, grant a given sect official status as the "one true church."[62] In a similar vein, questions regarding "free exercise" pose significant problems when the choice is whether to act or simply to believe. The theory is that, per *Sherbert v. Varner*, "no showing merely of a rational relationship to some colorable state interest w[ill] suffice."[63] Rather, a "claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert* . . . [which requires that] governmental actions that substantially burden a religious practice must be justified by a

60. Town of Greece v. Galloway, 575 U.S. 565, 605 (2014) (Thomas, J., concurring).

61. Daniel Chipman, Preface, 1 D. Chip. 2, 16 (Vt. 1824).

62. This is neither the time nor place to probe the significance of the fact that the First Amendment, as incorporated and made applicable against the states, does not declare that "neither Congress nor the States shall establish a religion." Rather, it declares that "Congress shall make no law *respecting* an establishment of religion." U.S. Const. amend. I (emphasis added). That formulation arguably means that those who framed it "saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects." Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).Its "real object" is "to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." Joseph Story, III Commentaries on the Constitution of the United States § 1871 (1833).

63. *Sherbert*, 374 U.S. at 406.

compelling governmental interest."[64] But as Justice Antonin Scalia observed for the Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, "[a]ny society adopting such a system would be courting anarchy," a "danger [that] increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[65] This does not mean that the beliefs Mr. Phillips embraces are not protected. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[66] The problem arises, rather, when an individual goes beyond mere belief or profession and asserts a right to actually act on those beliefs in the face of what Justice Scalia described as a "valid and neutral law of general applicability."[67]

Smith resurrected a belief/conduct dichotomy first articulated in 1878 in *Reynolds v. United States*.[68] The question before the Court was whether George Reynolds, a member of the Church of Jesus Christ of the Latter-day Saints (the Mormon Church), could claim the protection of the Free Exercise Clause in the face of a proscription against plural marriages. Reynolds averred that "the practice of polygamy was directly enjoined upon the male members" of the Mormon Church and that "the penalty for . . . failure and refusal would be damnation in the life to come."[69] The Court held that the free exercise guarantee protected beliefs, but not conduct. Drawing on the lessons

64. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882-83 (1990) (citing *Sherbert*, 374 U.S. at 402-03).

65. *Id.* at 888.

66. *Id.* at 877.

67. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263n. 3 (1982) (Stevens, J., concurring) (internal quotation marks omitted)). As a purely textual matter, there is a significant problem with all of this, given that the Free Exercise Clause speaks of the "exercise" of religion, as opposed to its embrace. I leave that to another day, noting only that the issue is real. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (arguing that the Free Exercise Clause protects "the freedom to *'exercise'* religion".)

68. 98 U.S. 145 (1878).

69. *Id.* at 161. For a discussion of the Mormon Church's current and past stances on polygamy, see *Plural Marriage in The Church of Jesus Christ of Latter-day Saints*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, [https://perma.cc/Q9A8-AM5R] (noting that "[b]y revelation, the Lord commanded Joseph Smith to institute the practice of plural marriage," but that the Church now "believe[s] that the marriage of one man and one woman is the Lord's standing law of marriage") (last visited Oct. 24, 2019).

imparted by various founding-era discussions, including the Virginia Statute for Religious Freedom and statements by Thomas Jefferson both before and after ratification,[70] it declared that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[71] To do otherwise, it observed, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[72]

Citing and quoting *Reynolds* with approval, Justice Scalia declared in *Smith* that "[s]ubsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[73] The Court accordingly rejected the assumption that strict scrutiny should apply when assessing Free Exercise claims.[74] "[T]he sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges."[75] To do otherwise would be to create "a private right to ignore generally applicable laws," an

70. *Id.* at 163-64. The Virginia Statute expressed strong support for "the field of opinion," but drew the line "when principles break out into overt acts against peace and good order." Act for Establishing Religious Freedom (Oct. 31, 1785), § 1, *in* 8 THE PAPERS OF JAMES MADISON 399, 400 (Robert A. Rutland et al. eds., Univ. of Chi. Press 1973). Jefferson, in turn, stated in no uncertain terms "that the legislative powers of government reach actions only, and not opinions." Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Thomas Jefferson Mem'l Assoc. 1905).

71. *Reynolds*, 98 U.S. at 164.

72. *Id.* at 167; *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.").

73. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)).

74. *Id.* at 885.

75. *Id.*

approach Justice Scalia characterized as "a constitutional anomaly."[76]

As the Court subsequently emphasized, "[i]n addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[77] As Justice David Souter explained, "[t]he proposition for which the *Smith* rule stands . . . is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause."[78] In effect, the standard is rational basis review: the government interest need only be legitimate, and accommodations for religious beliefs, if any, must come via the political process. Indeed, "a society that believes in the negative protection accorded to a religious belief can be expected to be solicitous of that value in its legislation as well."[79]

Smith was a narrow decision.[80] It was also roundly criticized.[81] Professor Laycock, for example, argued that "[o]ne function of judicial review is to protect religious exercise

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76. *Id.* at 886. Implicit in this line of analysis is the belief that strict scrutiny is "'strict' in theory and fatal in fact." Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

77. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

78. *Id.* at 563 (Souter, J., concurring).

79. *Smith*, 494 U.S. at 890.

80. The vote was 5-4, with Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joining the Scalia opinion. Justice O'Connor filed an opinion concurring in the judgement, joined by Justices Brennan, Marshall, and Blackmun. Justice Blackmun filed a dissent, joined by Justices Brennan and Marshall. *Id.* at 873. *See, e.g.*, *id.* at 891-92 (O'Connor, J., concurring in judgement) (characterizing the Court's holding as a "strained reading of the First Amendment" and "incompatible with our Nation's fundamental commitment to individual religious liberty"); *id.* at 907-08 (Blackmun, J., dissenting) (characterizing the majority opinion as a "perfunctor[y] dismiss[al]" of a "painstakingly . . . developed . . . consistent and exacting standard").

81. *See, e.g.*, Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991). For a sweeping condemnation of both *Smith* and the Court's current approach to free exercise claims, see Oleske, *supra* note 54.

against . . . hostile or indifferent consequences of the political process. The Court has abandoned that function, at least in substantial part, and perhaps entirely."[82] Congress agreed, passing the Religious Freedom Restoration Act (RFRA),[83] which stipulated that "[g]overnment shall not substantially burden a person's exercise of religion" absent a showing that "application of the burden to the person" is the "least restrictive means" to further "a compelling governmental interest."[84] The Court subsequently rejected this attempt to "decree the substance of . . . the Free Exercise Clause,"[85] holding that Congress could craft remedies for violations but could not alter the meaning stipulated by the Court.[86] "Congress does not enforce a constitutional right by changing what the right is."[87] RFRA could serve as a voluntarily agreed-upon limit on the exercise of federal authority,[88] but it could not and was not appropriately "designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."[89]

These background realities deeply influenced the posture of *Masterpiece Cakeshop*. The attorneys for Jack Phillips recognized that successful pursuit of the Free Exercise claim would require modification if not outright repudiation of *Smith*.[90] They accordingly placed most of their emphasis on a Free Speech claim, arguing principally that "[t]his Court's

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82. Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 68 (1990).

83. Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1489 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1993)).

84. 42 U.S.C. § 2000bb-1 (1993).

85. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

86. *See id.*

87. *Id.*

88. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (applying RFRA in a case parsing the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.)).

89. *City of Boerne*, 521 U.S. at 534-35. Congress subsequently enacted the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000), which reinstated a strict scrutiny regime for state actions regulating land use and the "religious exercise" of "institutionalized persons." For a brief history of the cases and statutes, *see* Holt v. Hobbs, 135 S. Ct. 853, 859-60 (2015).

90. *See* Petitioner's Brief, *supra* note 7, at 48 n.8 ("If the rules established in *Smith* do not protect Phillips here . . . then the standards adopted in that case should be reevaluated.").

compelled-speech doctrine forbids the Commission from demanding that artists design custom expression that conveys ideas they deem objectionable."[91]

This attempt to draw a sharp line between speech and religion is at best misleading. Jack Phillips was not advocating a constitutional right to refuse service based on a purely speech-grounded contention that his "custom wedding cakes are his artistic expression."[92] That would amount to a claim of an actual right to "[d]iscriminat[e] against gay people who marry,"[93] the equivalent of "discrimination 'directed toward gay persons as a class' [that] cannot be squared with the Constitution's guarantee of 'equal dignity.'"[94] Rather, his speech claim was inextricably linked to his religion claim, that for him, "like many adherents of the Abrahamic faiths . . . marriage has a 'spiritual significance' . . . to the point of being 'sacred.'"[95]

Simply put, the focus is not on speech per se, rather, it is on inherently religious speech. It is accordingly appropriate to eschew discussion of the Free Speech issues and focus our attention on the implications of Jack Phillips' claim that he "did not want to express ideas that offend his religious convictions about marriage."[96] The professed goal is to recognize and protect "[r]obust religious and expressive freedoms [which arguably] advance pluralism, protect other civil liberties, and

91. Petitioner's Brief, *supra* note 7, at 15; *see also* Reply Brief, *supra* note 24, at 1 ("Expressive freedom is central to human dignity. It requires that artists be free to make their own moral judgments about what to express through their works."). The merits brief devoted twenty-two pages to the Free Speech claim and only ten to the Free Exercise claim. The allocation of space was even more lopsided in the Reply Brief, which spent twenty pages on speech and only three on free exercise. A similar impulse apparently informed the strategy adopted by the plaintiff in Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (No. 18-12). As Justice Alito noted in his separate statement, "[p]etitioner's decision to rely primarily on his free speech claims as opposed to. . . alternative [free exercise] claims may be due to certain decisions of this Court." *Id.* at 636 (Alito, J. concurring) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) and Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)).

92. Petitioner's Brief, *supra* note 7, at 17.

93. Craig & Mullins Brief, *supra* note 10, at 43.

94. *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) and Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015)).

95. Petitioner's Brief, *supra* note 7, at 21 (quoting Turner v. Safley, 482 U.S. 78, 96 (1987), and *Obergefell*, 135 S. Ct. at 2594).

96. Petitioner's Brief, *supra* note 7, at 40.

promote true tolerance and civility."[97] The question then is whether this is a good idea given the "diversity of religious beliefs [in] 'a cosmopolitan nation made up of people of almost every conceivable religious preference.'"[98]

III. THE CAKE, FIRST LAYER: RELIGION?

Any discussion of the wisdom or viability of "robust" religious and expressive freedoms must take into account three realities. The first two are posed by *Frazee* and *Ballard.* Every individual is entitled to invoke the Free Exercise guarantee based on her or his sincerely held beliefs. These do not need to be found in the texts or teachings of any recognized religious sect. Rather, they may be premised simply and solely on that individual's reading of a sacred text or adherence to a particular conviction, textual or otherwise. Those beliefs are not, in turn, subject to question. There are no heresy trials in this nation and the sole dispositive question for a belief, no matter how divorced from what many regard as reality, is whether it is sincerely held. Finally, the field of inquiry is not confined to what Jack Phillips characterized as the "Abrahamic faiths."[99] Rather, it extends to the full range of individuals and ideas that prevail in an increasingly diverse, multicultural nation.

This final point is incredibly important. Professor Laycock, for example, argued in the wake of *Smith* that he "would grant most requests for exemption, because I think the text and purposes of the Free Exercise Clause require that government leave religion as free as can be managed in a complex urban society."[100] Most, however, is not all. As Professor William Marshall has observed,

> [m]inority belief systems . . . will bear the brunt of the definition and the sincerity inquiries. A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more

97. *Id.* at 61.

98. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)); *see also* United States v. Seeger, 380 U.S. 163,174 (1965) (noting the "richness and variety of spiritual life in our country" and that at that time "[o]ver 250 sects inhabit[ed] our land").

99. Petitioner's Brief, *supra* note 7, at 21.

100. Laycock, *supra* note 81, at 68.

> likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous.[101]

The answers may – or may not – be clear when the claim parallels one of Professor Marshall's favorite exemplars, the Tennessee man who argued that his religious beliefs required him to dress like a chicken in court.[102] So, for example, courts have rejected attempts to claim religious protection for adherents from the Church of Marijuana,[103] the Church of the Flying Spaghetti Monster,[104] and Veganism,[105] at least when it is divorced from roots in religions like Nazarite Judaism.[106] In each instance, these judgments have been based on problems associated with the individual claim.[107] That is, they did not actually hold that, consistent with judicial standards for "establishing the religious nature of [individual] beliefs,"[108] there can never be, for example, a Church of the Flying Spaghetti Monster. Indeed, conceding that the teachings of Creativity – "the central tenet of which is white supremacy"[109] – are "simplistic and repugnant to the notion of equality that

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101. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991).

102. *See id.* at 311 n. 17 (citing State v. Hodges, 695 S.W.2d 171 (Tenn. 1985)). The court dismissed his claim as "bizarre," quoting with approval Justice Robert Jackson's observation that "[t]he price of freedom of religion . . . is that we must put up with, and even pay for, a good deal of rubbish." State v. Hodges, 695 S.W.2d 171, 174 (Tenn. 1985) (quoting *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting)). The court was likely correct to reject the claim, given that Mr. Hodges provided scant support for grounding it in any religious teachings. It is not at all clear, however, given the *Frazee* and *Ballard* cases, that an individual could not in fact believe, as a religious matter, in the need to dress like a chicken in court.

103. *See, e.g.*, United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996).

104. *See, e.g.*, Cavanaugh v. Bartelt, 178 F. Supp. 3d 819 (D. Neb. 2016).

105. *See, e.g.*, Friedman v. S. Cal. Permanente Med. Grp., 125 Cal. Rptr. 2d 663 (Cal. Ct. App. 2002).

106. *See, e.g.*, Williams v. Annucci, 895 F.3d 180 (2d Cir. 2018).

107. *See, e.g.*, *Meyers*, 95 F.3d at 1484 (after "thorough analysis of the indicia of religion . . . we hold that Meyer's beliefs more accurately espouse a philosophy and/or way of life than a 'religion'"); *Cavanaugh*, 178 F. Supp. 3d at 829 (as advanced and supported by claimant, "FSMism is not a belief system addressing 'deep and imponderable' matters: it is . . . a satirical rejoinder to a certain strain of religious argument"); *Friedman*, 125 Cal. Rptr. 2d at 685 ("plaintiff alleges a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one's life based on that perspective").

108. *Meyers*, 95 F.3d at 1482.

109. Peterson v. Wilmur Commc'n, Inc., 205 F. Supp. 2d 1014, 1015 (E.D. Wis. 2002).

undergird the very non-discrimination statute at issue,"[110] one court held that the adherent in that case "has met his initial burden of showing that his beliefs constitute a 'religion' for purposes of Title VII."[111] The question was not whether the beliefs in question were "moral, ethical, or otherwise valid."[112] Rather, it was whether "[p]laintiff has shown that Creativity functions as religion in his life" and "is for him a religion regardless of whether it espouses goodness or ill."[113]

In other words, that which most observers would intuitively regard as ludicrous or morally intolerable might well merit religious protection. More to the point, as I demonstrate in Part IV, the problems I envision are more sweeping. This is not simply a matter of tolerating arguably bizarre religions and what many regard as their idiosyncratic beliefs. Many major, mainstream religions and their texts and tenets provide sincere believers ample bases for claims that we might otherwise be inclined to dismiss as outlandish.

The key question is then how and where to draw the line. The attorneys for Craig and Mullins and for the Colorado Commission repeatedly posed examples of the wide range of discriminatory practices that would be sanctioned if Phillips

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110. *Id.* at 1023.

111. *Id.* at 1022. *But see* Hale v. Fed. Bureau of Prisons, 759 Fed. Appx 741 (10th Cir. 2019) (employing the five-part analysis set forth in *Meyers* and concluding that Creativity is not a religion). This is the near universal result. *See* Todd v. Cal. Dep't of Corr. and Rehab., No. 1:12-cv-01003-DAD-BAM PC, 2018 WL 3968233 (E.D. Cal. Aug. 16, 2018) (collecting the cases). These decisions generally dismiss *Peterson*, stating that "a Title VII claim applies a much broader standard than that employed in the context of the First Amendment." *Id.* at *7 n.3. These courts do not, however, analyze these matters in any detail. Rather, they offer conclusory statements and ignore the extent to which the Title VII decisions rely on and adopt rules announced in cases like *Seeger*, grounded in the First Amendment and articulating general principles rather than Title VII-specific rules. Indeed, in *Peterson* the court stressed that 1972 amendments to Title VII were "intended to make the Title VII religious discrimination analysis the same as the analysis of claims under the Free Exercise Clause." *Peterson*, 205 F. Supp. 2d at 1021.

112. *Peterson*, 205 F. Supp. 2d at 1023. The court stressed that "[b]ased on the record . . . no reasonable jury could conclude that plaintiff committed any racially discriminatory acts." *Id.* at 1025. The sole dispositive question was that he had in fact been demoted because of his religion. *Id.* at 1024-26.

113. *Id.* at 1024. As part of its analysis the court noted and rejected as "of no assistance" two earlier decisions holding that the Ku Klux Klan was not a religion. *See id.* at 1022 (citing and discussing Slater v. King Soopers, Inc., 809 F. Supp. 10 (D. Colo. 1992) and Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va. 1973)).

were to prevail.[114] But counsel for Phillips largely ignored the invitation to discuss the full implications of the rule for which they argued, stating only that "the record in . . . case[s] like that would likely reveal that the cake artist engages in broader class-based discrimination against certain races."[115]

Phillips' supporters want to shift the inquiry from a focus on the religious belief to the person it targets.[116] Their goal is to avoid the problem posed by *Smith* by substituting the tests used for different group classifications for the more relaxed *Smith* standard. So, for example, if a given status classification requires strict scrutiny, then "laws targeting [that classification] may survive heightened First Amendment scrutiny."[117] The practical effect of this was articulated by the United States, which argued that "'racial bias' . . . poses 'unique historical, constitutional, and institutional concerns'" that make its elimination "the most 'compelling' of interests."[118] It then averred, in the specific contexts of that case, that "[t]he same cannot be said for opposition to same-sex marriage."[119]

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114. *See, e.g.*, Craig & Mullins Brief, *supra* note 10, at 3 (citing refusals "to provide cakes for an interracial or interfaith couple's wedding, a Jewish boy's bar mitzvah, an African-American child's birthday, or a woman's business school graduation party"); Brief for Respondent Colo. Civil Rights Comm'n at 4, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) ("a racist baker could refuse to sell 'Happy Birthday' cakes to African-American customers, a screen printer could refuse to sell a banner announcing a Muslim family's reunion, and a tailor could refuse to sell a gay man a custom suit for a charity gala"). *See also* Brief of Amicus Curiae NAACP Legal Defense & Educ. Fund, Inc. in Support of Respondents, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (extended discussion of the history and further potential for racial discrimination "justified" by religious beliefs) [hereinafter NAACP Brief].

115. Reply Brief, *supra* note 24, at 15. When pressed at oral argument regarding a variety of hypotheticals, including race, gender, or disability, counsel again largely avoided the issue. *See* Transcript of Oral Argument at 18-24, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Masterpiece Transcript]. For example, when confronted directly about race, counsel responded "[t]his Court has never compelled *speech* in the context of race," *id.* at 20 (emphasis added), an answer designed to avoid the implications of the Court's condemnation of religiously motivated discrimination on the basis of race as "patently frivolous" in Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 404 n.5 (1968).

116. *See* Masterpiece Transcript, *supra* note 117, at 23-24.

117. Brief for the United States as Amicus Curiae Supporting Petitioners at 32, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter United States Brief].

118. *Id.* (quoting Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017) and Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983)).

119. *Id.*

But it is not at all clear that this is what matters when the question, properly posed, is not discrimination on the basis of group identity but rather whether government has "impose[d] special disabilities on the basis of religious views or religious status."[120] The argument for Jack Phillips is that religion is special, worthy of protection even in the face of *Smith's* refusal to accord it the heightened protection normally applied to "specific prohibition[s] of the Constitution, such as those of the first ten amendments."[121] I leave to another time and place whether attaining that goal requires modification of repudiation of *Smith*.[122] Rather, I want to explore just how far we should be willing to go in the light of the myriad possibilities posed by an approach to Free Exercise if "[w]hat matters for identifying burdens on religious liberty is the religious claimant's understanding."[123]

IV. THE CAKE, SECOND LAYER: RACE AND GENDER

The most obvious problem is posed by race, in particular the so-called Curse of Ham or Noah's Curse.[124] Rooted in the biblical story of Noah condemning his son for "s[eeing] the nakedness of his father,"[125] the Curse of Ham is the most

120. *Smith*, 494 U.S. 877.

121. *Id.* at 888-89; United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

122. I also forgo any discussion of whether Justice Alito's separate statement on the denial of review in Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S.Ct. 634 (2019), which was joined by Justices Thomas, Gorsuch, and Kavanaugh, signals that at least four members of the Court are now ready to revisit that opinion.

123. Berg & Laycock Brief, *supra* note 55, at 17. *Accord*, Frederick M. Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 130-31 (2017) ("what matters is not whether *the court* finds a claimant's understanding of theological consequences credible, but whether *the claimant* does").

124. *See* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 35 GA. L. REV. 657, 667 (2011).

125. *Genesis* 9:22. All citations to and quotations from the Christian Bible are taken from THE NEW OXFORD ANNOTATED BIBLE: NEW REVISED STANDARD VERSION WITH THE APOCRYPHA (Michael D. Coogan ed., 2018). In virtually every instance, with slight changes in the wording, the prohibitions found in that work are repeated in THE JEWISH STUDY BIBLE (Adele Berlin & Marc Zvi Brettler eds., 2004). Compare, for

common religious source for those seeking to discriminate on the basis of race, "a general indictment of the Hamite race, namely, persons of African descent."[126] While the doctrine in now primarily associated with certain strains of fundamentalist Christianity, in particular those that tried to justify slavery in the Old South,[127] both Judaism and Islam have been associated with those arguing for its existence and racial implications.[128] Some scholars question whether the statements in *Genesis* actually targeted members of the African nations and race.[129] That really does not matter. *Ballard* counsels that we respect the sincere beliefs of any individual who reads that Book, where Isaac tells Jacob that "[y]ou shall not marry one of the Canaanite women,"[130] with adherents concluding that this targets "persons of African descent."[131]

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example, the condemnation of "mixed" marriages in the Oxford version, *Deuteronomy* 7:3 ("Do not intermarry with them, giving your daughters to their sons or taking their daughters for your sons.") with the same passage in the Jewish text ("You shall not intermarry with them: do not give your daughters to their sons or take their daughters for your sons.").

126. Eskridge, *supra* note 127, at 667.

127. *See e.g.,* STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002). The Mormon Church also embraced this, with Brigham Young stating that "[t]he seed of Canaan will inevitably carry the curse which was placed upon them until the same authority, which placed it there, shall see proper to have it removed." Brigham Young, Speech to the Joint Session of the Legislative Assembly, Jan. 5, 1852, *quoted in* Newell G. Bringhurst, *The Mormons and Slavery: A Closer Look*, 50 PAC. HIST. REV. 329, 336 (1981). For a general treatment of Mormon views, see NEWELL G. BRINGHURST, SAINTS, SLAVES, AND BLACKS: THE CHANGING PLACE OF BLACK PEOPLE WITHIN MORMONISM (1981).

128. *See e.g.,* David N. Goldenberg, *The Curse of Ham: A Case of Rabbinic Racism?, in* STRUGGLES IN THE PROMISED LAND: TOWARDS A HISTORY OF BLACK-JEWISH RELATIONS IN THE UNITED STATES (Jack Salzman & Cornel West eds., 1997). Goldenberg notes that "[t]he proposition that ancient Jewish society invented anti-Black racism was first stated about thirty years ago and has been increasingly repeated in scholarly and nonscholarly works of all sorts." *Id.* at 22. He disputes the account, declaring that "the five Jewish texts reputed to show anti-Black racism actually present an entirely different picture." *Id.* at 31. He also traces, but largely does not dispute, Islamic sources, stating that "[f]rom the seventh century onwards the concept appears as a recurring theme among Islamic writers who tightly link blackness and slavery." *Id.* at 33. For a lengthy and detailed dicussion, see DAVID M. GOLDBERG, THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM 142-93 (2005).

129. *See, e.g.*, O. Palmer Robertson, *Current Critical Questions Concerning the "Curse of Ham" (Gen. 9:20-27)*, 41 J. OF THE EVANGELICAL THEOLOGICAL SOC'Y 177, 177 (1998) ("It might be assumed that social advancements in the twentieth century have put to rest this rather twisted way of reading Scripture.").

130. *Genesis* 28:1. For a more general condemnation of "mixed" marriages, see *Deuteronomy* 7:3-4 ("Do not intermarry with them, giving your daughters to their sons or

As the NAACP reminded the *Masterpiece Cakeshop* Court, "[w]hile justifying racial discrimination on the basis of religion might seem outlandish or offensive today, the unfortunate truth is that those sorts of arguments were once common."[132] They also have staying power.[133] Three relatively recent cases illustrate the point: *Loving v. Virginia*,[134] which focused on interracial marriage; *Newman v. Piggie Park Enterprises, Inc.*,[135] which involved discrimination in places of public accommodation; and *Bob Jones University v. United States*,[136] which examined whether schools that engage in racially discriminatory practices should enjoy tax-exempt status. Two of the three are arguably of marginal value for present purposes, for in neither did the Court directly confront, much less discuss, the nature and implications of a Free Exercise claim. The third, in turn, treats the issue in a cursory and conclusory manner.

The Court did note in *Loving* that the trial court judge, in assessing the propriety of Virginia's ban on interracial marriage, declared:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[137]

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taking their daughters for your sons, for that would turn away your children from following me, to serve other gods."; *2 Corinthians* 6:17-18 ("Therefore come out from them, and be separate from them, says the Lord, and touch nothing unclean; then I will welcome you, and I will be your father, and you shall be my sons and daughters, says the Lord Almighty.").

131. Eskridge, *supra* note 127, at 667.

132. NAACP Brief, *supra* note 116, at 5. The brief provides a good survey of the cases, in particular the many state court decisions invoking religion as a justification for bans on interracial marriage. For a general defense of the notion that both the Old and New Testaments teach racial segregation, see HUMPHREY K. EZELL, THE CHRISTIAN PROBLEM OF RACIAL SEGREGATION 13-22 (1959). For a discussion of the centrality of religious sanction of slavery in secession and the Civil War, see MITCHELL SNAY, GOSPEL OF DISUNION: RELIGION AND SEPARATION IN THE ANTEBELLUM SOUTH 54-57 (1993).

133. *See infra* notes 137-39 and accompanying discussion.

134. 388 U.S. 1 (1967).

135. 390 U.S. 400 (1968).

136. 461 U.S. 574 (1983).

137. *Loving*, 388 U.S. at 3 (internal quotation marks omitted).

This was the sole reference to religion and the Court never directly addressed this aspect of the case. It focused instead on two independent constitutional bases for invalidating the Virginia statute. Noting that the Equal Protection Clause required that the interracial marriage ban be subjected to "the most rigid scrutiny,"[138] the Court declared that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[139] The Due Process Clause in turn provided a second basis for repudiation: "To deny this fundamental freedom on so unsupportable basis as [a] racial classification[] . . . is surely to deprive all the State's citizens of liberty without due process of law."[140] Free exercise of religion was simply not discussed.

The second relatively contemporaneous example came in *Piggie Park Enterprises*, where the proprietor of five drive-in restaurants and a sandwich shop maintained that "the [Civil Rights] Act [of 1964] violates his freedom of religion under the First Amendment 'since his religious beliefs compel him to oppose any integration of the races whatever.'"[141] The District Court rejected that argument, declaring that the defendants were entitled to their beliefs, but they do "not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[142] The district court also held that only one of the six businesses met the jurisdictional requirements of the Act, a determination that was reversed on appeal in an opinion within which the religious bases for refusing service was neither mentioned nor discussed.[143]

The Supreme Court then granted review for the sole purpose of considering whether the plaintiffs could recover attorneys fees, which it held they could.[144] Neither religion nor Free Exercise were mentioned in the opinion itself. Rather, it

138. *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)) (internal quotation marks omitted).

139. *Id.*

140. *Id.* at 12.

141. Newman v. Piggie Park Enter., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966).

142. *Id.* at 945.

143. *See* Newman v. Piggie Park Enter., Inc., 377 F.2d 433, 434-37 (4th Cir. 1967).

144. *See* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 401-03 (1968).

relegated the merits of the defendants' claims to a footnote, where it declared only that "respondents interposed defenses [were] so patently frivolous that a denial of counsel fees to petitioners would be manifestly inequitable."[145] That conclusion may have great appeal, but it is surely at odds with *Ballard's* central lesson, that "the thing the Constitution put[s] beyond . . . reach . . . for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."[146]

The final example is *Bob Jones University*. Two private institutions were involved: Bob Jones University, which admitted African American students but banned interracial dating and marriage, and the Goldsboro Christian Schools, which had a racially discriminatory admissions system. [147] The issue for the Court was whether either could qualify as a tax-exempt organization. Most of the its opinion focused on whether the two fulfilled the "public benefit principle," which requires that "the purpose of a charitable [organization] not be illegal or violate established public policy."[148] The Court held that they did not meet that standard, stating that "[g]iven the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life.'"[149] The Court also rejected the Free Exercise claim, stating that "the Government has a fundamental, overriding interest is eradicating racial discrimination in education,"[150] an interest that barred receipt of the tax exemption "but will not prevent those schools from

145. *Id.* at 402 n.5.

146. United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

147. Both based their policies on their reading of the Bible. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage."); *id.* at 583 ("Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based on its interpretation of the Bible."). Given *Frazee*, it is worth noting that "Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs." *Id.* at 580.

148. *Id.* at 591.

149. *Id.* at 595 (citing Plessy v. Ferguson, 163 U.S. 537 (1896) and quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 673 (1970)).

150. *Id.* at 604.

observing their religious tenets."[151] In other words, it left the beliefs unquestioned, allowing both institutions to observe them while simply and only denying them the added benefit of the tax exemption they had previously enjoyed.

These three cases have been routinely cited for the proposition that "[t]he overarching lesson . . . is that [the Supreme Court] has repeatedly and unambiguously rejected religious-based justifications for differential treatment."[152] But it is not at all clear that any of the three directly addressed the issues posed by Jack Phillips and avoided in *Masterpiece Cakeshop*: whether government can "devalue[] religious reasons for declining [a] request" to provide services and whether "religious beliefs . . . [can be] discriminatory in and of themselves."[153] Don't get me wrong. I do not for a moment believe that the Court, even if it takes a post-Brett Kavanaugh sharp turn to the right, will sanction religiously motivated discrimination on the basis of race. As the United States observed in its brief supporting Jack Phillips, "[a] State's 'fundamental, overriding interest' in eliminating private racial discrimination—conduct that 'violates deeply and widely accepted views of elementary justice'—*may* justify even those applications of a public accommodations law that infringe on First Amendment freedoms."[154]

That said, the problems posed by such claims are more complex than the simple notion that they should be rejected because they would amount to "an objection to the person,"[155] as opposed to, for example, an "objection to the message being conveyed."[156] More to the point, assuming we are willing to

151. *Bob Jones Univ.*, 461 U.S. at 603-04.

152. NAACP Brief, *supra* note 116, at 15.

153. *See* Petitioners Brief, *supra* note 7, at 43.

154. United States Brief, *supra* note 120, at 32 (emphasis added) (quoting *Bob Jones Univ.*, 461 U.S. at 592, 604). I don't know what to make of the government's equivocation—"may" rather than "must"—and if it presages a willingness to tolerate discrimination of the basis of race if the impetus is a sincere religious belief. More to the point, the fact that such views are "deeply and widely accepted" does not mean they are universally embraced, much less that the sincerely religiously motivated individual agrees with them.

155. Masterpiece Transcript, *supra* note 117, at 21. The statement was made by Kristen Waggoner, counsel for Jack Phillips, in response to a question from Justice Sonia Sotomayor, asking if free speech or free exercise claims could "trump" public accommodation laws. Ms. Waggoner responded, "[t]hat is not my theory." *Id.*

156. *Id.* at 22.

assign condemnation of racial discrimination unique status in our constitutional system, how do we distinguish other religiously motivated claims given religions express constitutional status?

Gender is, of course, the next most likely source of difficulty. Religious bases for discriminating against women in a variety of ways are legion. Women *per se* can plausibly be viewed as evil, given that "[f]rom a woman sin had its beginning, and because of her we all die."[157] What about a wife, making decisions or engaging in activities without the participation or consent of her husband? "Christ is the head of every man, and the husband is the head of his wife."[158] What about a woman who has borne no children, since they "will be saved through childbearing, provided they continue in faith and love and holiness, with modesty"?[159] Women teachers, especially those who have men for students? "I permit no woman to teach or to have authority over a man; she is to keep silent."[160] Any woman who is not subject to a man? "In childhood, a woman must be subject to her father; in youth to her husband; when her lord is dead, to her son; a woman must never be independent."[161] A widow? "After the death of her husband, to preserve her chastity, or to ascend the pile after him."[162] Indeed, what about single men? "Any man who has no wife is no proper man; for it is said, Male and female created He them and called their name Adam."[163] A man who owns no land? "Any man who owns no land is not a proper man; for it is

157. *Ecclesiasticus* 25:24; *see also 1 Timothy* 2:13-14 ("For Adam was formed first, then Eve; and Adam was not deceived, but the woman was deceived and became a transgressor").

158. *1 Corinthians* 11:3; *see also Titus* 2:5 (women should be "submissive to their husbands, so that the word of God may not be discredited"); *Ephesians* 5:22-23 ("Wives, be subject to your husbands as you are to the Lord. For the husband is head of the wife just as Christ is the head of the church, the body of which he is the Savior.").

159. *1 Timothy* 2:15.

160. *1 Timothy* 2:12.

161. *The Laws of Manu*, *in* 25 THE SACRED BOOKS OF THE EAST 169, 195 (F. Max Muller ed., Oxford at the Clarendon Press) (1886).

162. *The Institutes of Vishnu*, *in* 7 THE SACRED BOOKS OF THE EAST 110, 111 (F. Max Muller ed., Oxford at the Clarendon Press) (1886).

163. *Babylonian Talmud: Tractate Yebamoth*, HALAKHAH Folio 63a, [https://perma.cc/UZ73-4Z5Y](last visited Oct. 25, 2019). *See also Genesis* 2:18 ("Then the LORD GOD said, 'It is not good that man should be alone; I will maker him a helper as his partner.'").

said, the heavens are the heavens of the Lord; but the earth hath he given to the children of men."[164]

These are just a few of the many possibilities. And they are consistent with a historic record within which the belief in "[w]omen's secondary status often was rooted in genuinely held religious beliefs about sex-based hierarchy and women's role within the family."[165] As Justice Joseph P. Bradley infamously observed, "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[166] This may have been an acceptable approach then, but hopefully not now. Distinctions drawn on the basis of gender, especially those grounded in discriminatory stereotypes, are strongly disfavored and subjected to a form of heightened scrutiny within which the question is whether the government has an "exceedingly persuasive justification," which means "at least" that the classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[167]

Various attempts have been made to designate the interest required in gender cases as "compelling," relying on statements that have used that term to characterize the interest in eradicating discrimination of the basis of gender. For example, Justice Sandra Day O'Connor observed in *Roberts v. United States Jaycees* that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit."[168] It may well be that it is appropriate to describe the nature of the interest required as "compelling" rather than simply "important." But that does not transform the applicable standard from intermediate to strict scrutiny. As the

164. *See Babylonian Talmud*, *supra* note 171, at Folio 63a. .

165. Brief of the National Women's Law Ctr. and Other Grps. in Support of Respondents at 3, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

166. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

167. United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

168. 468 U.S. 609, 628 (1984).

Court has stressed, its treatment of these matters has not "equat[ed] gender classifications, for all purposes, to classifications based on race or national origin."[169]

Regardless, this approach once again attempts to shift the focus from the religious belief espoused to the party against whom it is directed. It also elides over one of the key reasons why the Court has not embraced a strict scrutiny regime for gender classifications: the inescapable reality that there are in fact differences between men and women that can and should matter. In *Michael M. v. Superior Court,*[170] for example, the Court sustained a California statutory rape measure that punished men but not women, given the professed state interest in preventing pregnancies.[171] In a similar vein, in *Rostker v. Goldberg*, the Court held that the fact that women were not eligible for combat duty meant that they were not required to register for the draft.[172] On what basis then do we denigrate or invalidate sincere religious beliefs that there are in fact stark differences between men and women that religious adherents are bound to respect?

I am wholly in sympathy with the notion that free exercise should not serve as a justification for invidious discrimination, even as I struggle with the reality posed by *Smith*: that we cannot allow every person to become a law unto her- or himself. Like many academics, I was initially appalled by that decision. I taught it as the unfortunate portion of a bad news/good news duo given the Court's subsequent insistence that the laws applied to such matters must in fact be neutral and generally applicable.[173] These views have changed, as I contemplate the

169. *Virginia*, 518 U.S. at 532.

170. 450 U.S. 464 (1981).

171. *Id.* at 470 ("The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies.").

172. 453 U.S. 57, 76-78 (1981). The fact that women may now serve in combat roles, and have done so, casts doubt on the continuing viability of the Court's decision that a male-only selective service system is constitutional and two courts have so held. *See* Kyle-Labell v. Selective Serv. Sys., 364 F. Supp. 3d 394 (D.N.J. 2019); Nat'l Coal. for Men v. Selective Serv. Sys., 355 F. Supp. 3d 568 (S.D. Tex. 2019). That said, I for one doubt very much that Congress will require women to register or that today's Court would not afford "substantial deference" to that judgment.

173. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). As Justice Kennedy observed for the Court, the "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious

lessons of *Frazee* and *Ballard* and struggle with the myriad ways in which a single individual can invoke religious beliefs as a basis for treating people in ways that violate basic norms. Moreover, I am not the Court, and it is far from clear that a majority of the current Justices would be inclined to take a more stringent path given the observation in *Masterpiece Cakeshop* that "religious and philosophical objections . . . are protected views and in some instances protected forms of expression."[174] Thus, while it is the "general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law,"[175] the question remains: how (if at all) do we determine which "religious beliefs and persons are . . . fully welcome in [our] business communit[ies]?"[176]

A rule based on the standard of review that is used to assess claims of discrimination against recognized protected groups may provide a good initial point of departure. But what do we do with an important subtheme in *Masterpiece Cakeshop*, the reality that Charlie Craig and Dave Mullins were able to get married and to secure a cake from another source? Is it appropriate to craft an approach that would excuse an individual vendor if the couple is able to be married in a religious ceremony elsewhere?[177] Or if there are other places in the community willing and able to provide the goods and services requested? Professors Berg and Laycock, for example, maintain that "[c]ouples who obtain their cake from another baker still get to live their own lives by their own values. They will still celebrate their wedding, still love each other, still be married, and still have their occupations or professions."[178]

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beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. In such instances, strict scrutiny applies.

174. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

175. *Id.* (citing Newman v. Piggie Park Entr, Inc., 390 U.S. 400, 402 n.5 (1968)).

176. *Id.* at 1729.

177. While not stipulated in the briefs, "[a] pastor officiated [t]he wedding" of Craig and Mullins in Massachusetts and they "exchanged vows and rings just as they'd do any religious wedding." Email from Kristen Waggoner, Alliance Defending Freedom, to author (Sept. 22, 2018) (on file with author).

178. Berg & Laycock Brief, supra note 55, at 32.

This line of argument was intimated but not pursued in *Heart of Atlanta Motel, Inc. v. United States*.[179] In its merits brief, the motel stressed that the "testimony" below "was totally lacking in the enumeration of the many hotels in the Southeast who had accepted Negroes as well as white guests long before the passage of the Civil Rights Act of 1964."[180] But the motel did not formally argue for a "comprehensive marketplace" exception and the Court did not address the issue. Rather, it stressed that "Negroes in particular have been subject to discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight."[181] In a similar vein, there was no attempt to argue that there were other places where African Americans could dine in *Katzenbach v. McClung*.[182] The Court did note that "discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under the most unsatisfactory and often unpleasant conditions."[183] But the main focus in that case was whether Ollie's Barbecue met the jurisdictional predicates in the Civil Rights Act of 1964, in particular the extent to which "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in interstate commerce."[184]

I would not like to think that the Court would accept the argument that the availability of alternate sources of goods and service relieves a particular vendor of its legal obligations. That would certainly undermine two central purposes of the various civil rights acts and public accommodations laws: the need to ensure "society the benefits of wide participation in political, economic, and cultural life,"[185] and the "vindicat[ion] . . . of

179. 379 U.S. 241 (1964).

180. Petition for Appellant at 20, Heart of Atl. Motel, Inc. v. United States, 379 U.S. 241 (1964) (No. 515).

181. *Id.* at 252-53.

182. 379 U.S. 294 (1964).

183. *Id.* at 300.

184. *Id.* at 298 ((quoting Civil Rights Act of 1964 2 U.S.C. § 201(b)(2), (3)) (internal quotation marks omitted)).

185. Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1983).

personal dignity that surely accompanies denials of equal access to public establishments."[186]

Then again, who knows? Especially given the hints dropped by Justice Alito, joined by Chief Justice Roberts and Justice Thomas, in his dissent from the denial of a writ of certiorari in *Stormans, Inc. v. Wiesman*.[187] That case involved a Washington State rule that required pharmacies to "stock emergency contraceptives, such as Plan B, that can 'inhibit implantation' of a fertilized egg."[188] Stormans is a corporation owned and run by a family with a strong religious "conviction that life begins at conception and that preventing the uterine implantation of a fertilized egg is tantamount to abortion."[189] The regulations expressly forbid an exception on religious grounds and the Stormans argued that this violated their Free Exercise rights. The District Court agreed.[190] The Court of Appeals for the Ninth Circuit reversed.[191] Applying the relaxed *Smith* standard, it held that "the rules are neutral and generally applicable and . . . further the State's interest in patient safety."[192]

The key element in all of this for current purposes is the practice of "facilitated referral," a routine undertaking by pharmacies that do not carry a drug that one of their customer's needs. As Justice Alito stressed in his dissent from the denial of review, "[t]he drugs [in question] are stocked by *more than 30 other pharmacies within five miles of [Stormans]*."[193] As a result, "[b]ecause of the practice of facilitated referrals, none of Ralph's customers has ever been denied timely access to emergency contraceptives."[194] There is no way to tell if he and his colleagues found the facilitated referral aspect of the case potentially dispositive. Justice Alito also raised other significant questions about the result below that have particular resonance

186. Heart of Atl. Motel v. United States, 379 U.S. 241, 250 (1964) ((quoting S. REP. NO. 872, at 15-18, 88th Cong., 2d Sess. (1964)) (internal quotation marks omitted)).

187. 136 S. Ct. 2433 (2016).

188. *Id.* at 2433.

189. *Id.*

190. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925 (W.D. Wash. 2012).

191. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

192. *Id.* at 1071.

193. *Id.* at 2433 (Alito, J., dissenting) (emphasis in original).

194. *Id.* at 2434.

in the light of *Masterpiece Cake*. For example, he questioned whether the rules were indeed neutral and whether they granted secular exemptions but refused to grant a religious one.[195] But the extensive discussion of a broad marketplace principle in both the Alito dissent and the lower court opinions is nevertheless of extraordinary interest, especially given the replacement of Justices Scalia and Kennedy by, respectively, Justices Gorsuch and Kavanaugh.[196]

Finally, what do we do when the Court has not recognized a given set of individuals or given practices as ones that merit heightened scrutiny protection? As matters currently stand, we do not know for a fact whether same-sex relationships and conduct get at least intermediate if not strict scrutiny. That result, in a properly presented case, seemed likely while Justice Kennedy was on the Court. Odds for that are now arguably diminished in the wake of his retirement and replacement by Justice Kavanaugh. Regardless, homosexuality of any sort is widely condemned in religious texts. "[T]he LORD rained on Sodom and Gomorrah sulfur and fire from the LORD out of heaven; and he overthrew those cities, and all of the Plain, and all the inhabitants of the cities, and what grew on the ground."[197] That disapproval extends to all of those who have "in the same manner as they [in Sodom and Gomorrah] indulged in sexual immorality and pursued unnatural lust, serve as an example by undergoing a punishment of eternal fire."[198] Indeed, what about anyone who has sex outside of a marriage of one man and one woman? "Do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived! Fornicators, idolaters,

195. *See id.* at 2436-40

196. Justice Scalia did not participate in the Stormans case, having passed away the previous February. Justice Gorsuch in turn had not yet been confirmed when the writ was denied. It is also worth noting that Justice Kennedy did not at that time seem much concerned about arguably anti-religion sentiments that were present in the record, sentiments and statements that closely tracked those he found objectionable in Masterpiece Cakeshop. *See, e.g., id.* at 2434 (quoting Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1178, 1172 (W.D. Wash. 2012)) ("The district court found that the regulations were adopted with 'the predominant purpose' to 'stamp out the right to refuse' to dispense emergency contraceptives for religious reasons.").

197. *Genesis* 19:24-25.

198. *Jude* 7.

adulterers, male prostitutes, sodomites . . . none of these will inherit the kingdom of God."[199]

There are then ample religious justifications for refusing to serve or accommodate individuals on the basis of race or gender. These are not confined to creeds that are at least arguably outliers, like Creativity.[200] Sincere adherents to such beliefs might well accordingly expect the courts to recognize their preferences and give them legal force. I for one doubt that this will become the rule. It will nevertheless require more than we have been given to date to justify carving out such exceptions.

IV. FROSTING ON THE CAKE: ALL THE SPITES THAT MIGHT PLAGUE MANKIND

The problems posed by the spectre of discrimination based on race and gender are serious and potentially intractable. It is one thing to say that disparate treatment on these bases is invidious. "There is no caste here. Our Constitution is color [and gender]-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[201] It is quite another to tell the sincere religious adherent that our commitment to these precepts means that she or he must risk "damnation in the life to come."[202]

These concerns are even more profound for the as-yet unresolved issue of what standard should apply to discrimination based on sexual orientation or sexual status. The Court itself has not resolved this question. Various lower courts have suggested that some form of heightened scrutiny is appropriate.[203] That seems both obvious and correct and the realities posed by the facts of *Masterpiece Cakeshop* counsel that at least intermediate scrutiny is called for. But we do not as yet know the answer. And changes in the composition of the Court may not bode well for those determined to eradicate the stain of religious and social forces that purportedly "love the sinner, but hate the sin," even argue for social policies and criminal laws that consign these

199. *1 Corinthians* 6:9-10.

200. *See supra* notes 113-15 and accompanying text.

201. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

202. Reynolds v. United States, 98 U.S. 145, 161 (1878) (internal quotation mark omitted).

203. *See* Wolf v. Walker, 986 F.Supp.2d 953, 1014 (W.D. Wis. 2014).

individuals to the margins of society and deny "the humanity and integrity of homosexual persons."[204]

These problems are compounded when we realize and acknowledge that there are innumerable other bases for religious-based discrimination lurking in various religious texts and the minds of those who read them. It is important to recognize, of course, that any such claims must be assessed in the light of the reality that public accommodations statutes and regulations are exceptions to a general rule that many, but not all, businesses and vendors have a right to refuse service.[205] As Justice Holmes observed regarding the difference between "public utilities" and "businesses generally,"

> [i]t is true that all business, and for the matter of that, every life in all its details, has a public aspect, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wars arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive . . . it is assumed that such a calling is not public as the word is used.[206]

Public accommodations measures are, accordingly, designed to carve out an exception when "any [] business" offers "sales" or "services."[207] They also tend to specify particular "individual[s]" or "group[s]" that will be protected.[208] Jack Phillips and his business, Masterpiece Cakeshop, met Colorado's definition of a place of public accommodation and were subject to that state's bar on discrimination on the basis of sexual orientation. That same situation – express statements

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204. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

205. I am indebted to Professor Andrew Koppelman for reminding me of this rather obvious reality and prompting revisions that take it into account.

206. Terminal Taxicab Co. v. Kutz, Newman, and Brownlow, Comm'rs, 241 U.S. 252, 256 (1916) (citation omitted). For a dated but exhaustive canvas of the common law rules and the "modern" exceptions for garden-variety businesses, *see* Alfred Avins, *What Is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1 (1968).

207. *See, e.g.*, COLO. REV. STAT. § 24-34-601(1) (2014).

208. COLO. REV. STAT. § 24-34-601(2)(a) (specifying discrimination on the basis of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry").

regarding who or what is protected – may or may not be present in many of the situations I am about to discuss. To the extent they are, religion-based claims that the prohibition should not apply pose significant problems. But even where the statutory grounds are not implicated, a potential religious-based claim should give us pause. What should our approach be if, as Professor Koppelman suggests, we do indeed live in a society that "tolerates idiosyncratic discrimination" but treats "[p]ervasive prejudice [a]s different."[209] I agree that our lodestar should be "the project of transforming culture to eradicate the notion that some classes of persons are beings of an inferior order who have no rights."[210] But I also worry about the implications of a constitutional regime within which we must protect "religious views" that "might seem incredible, if not preposterous, to most people."[211]

I am not arguing, for example, that there are jurisdictions within which it is now illegal to discriminate against individuals with tattoos or body piercings.[212] Or that there will be a mass impetus to do so if the Court sanctions religious-based exceptions to neutral laws of general applicability. Rather, I am asking us to recognize and account for the myriad possibilities posed by any such rule, and to reflect on how we might go about the business of deciding "which ideas are so odious as to be intolerable?"[213] On what bases – if any – should the sincere religious adherent be able to claim that she or he is simply expressing a "reasonable" desire to "accept some customers and reject others on purely personal grounds"?[214] On what bases, if any, might we be tempted to decide that a particular religious claim is not in fact reasonable, and therefore not within even the exceedingly generous standard that arguably governs day-to-day business transactions?[215]

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209. Andrew Koppelman, *The Joys of Mutual Contempt*, *in* RELIGIOUS FREEDOM. LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 111, 112 (William N. Eskridge & Robin F. Wilson eds., 2019).

210. *Id.*

211. United States v. Ballard, 322 U.S. 78, 87 (1944).

212. *See infra* text accompanying note 268-73.

213. *See* Koppelman, *supra* note 227, at 113.

214. Williams v. Howard Johnson's Inc. of Wash., 210 F. Supp. 295, 297 (E.D. Va. 1962).

215. Recall, for example, the Court's claim that even under the non-standard standard of "rational basis review," government actions targeting individuals on the basis

What exactly do I have in mind? What are the many possibilities that various religious tenets pose?

What about any person of another faith? "[F]or you shall worship no other God, because the LORD, who name is Jealous, is a jealous God."[216] Christians? "It is they whom God has rejected; and he whom God rejects shall find none to succor him."[217] Jews? "Woe to you, scribes and Pharisees. . . . [Y]ou testify against yourselves that you are the descendants of those who murdered the prophets. Fill up, then, the measure of your ancestors. You snakes, you brood of vipers! How can you escape being sentenced to hell?"[218] Both Jews and Christians? "Oh you who have attained the faith! Do not take the Jews and the Christians for your allies: they are but allies of one another – and whoever of you allies himself with them, becomes, verily, one of them; behold, God does not guide such evildoers."[219] Atheists? "And many human beings [submit to God consciously], whereas many [others, having defied Him], will inevitably have to suffer [in the life to come]."[220] Indeed, "[b]ut as for him who rejects belief [in God] – in vain will be all his works: for in the life to come he shall be among the lost."[221]

What about any "mixed" marriage, given that "[w]e abhor all unlawful mixtures, and that which is practised by against nature as wicked and impious."[222] Those who pursue another's wife? "Metal-toothed, huge bodies, blazing fearsome females, embracing him, feed on the one who steals another's wife."[223] In particular, "[s]hun fornication! Every sin that a person

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of sexual orientation and mental disability were invalid. *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

216. *Exodus* 34:14.

217. *Qur'an* 4:52. Excerpts from the Qur'an are taken from THE MESSAGE OF THE QUR'AN: THE FULL ACCOUNT OF THE REVEALED ARABIC TEXT ACCOMPANIED BY PARALLEL TRANSLITERATION (Muhammad Asad trans., The Book Foundation 2003).

218. *Matthew* 23: 29, 31-33.

219. *Qur'an* 5:51.

220. *Qur'an* 22:22-23.

221. *Qur'an* 5:5. In effect, this and the previous several examples pose the ironic situation that public accommodations proscriptions against discrimination on the basis of religion will collide with sincere religion-based motives for discriminating.

222. *Apostolic Constitutions* 6:11. *See* CONSTITUTIONS OF THE HOLY APOSTLES, OR, THE APOSTOLIC CONSITUTIONS, 95-96 (James Donaldson ed., Codex Spiritualis Publ'n, n.d.) (390 A.D.).

223. *Secondary Nirayas [Hells]*, *in* BUDDHIST SCRIPTURES 7, 8 (Donald S. Lopez, Jr. ed., Penguin Books, 2004).

commits is outside the body; but the fornicator sins against the body itself"?[224] Then there is the sweeping admonition "[d]o not commit adultery. Do not have sex with children. Do not be sexually promiscuous."[225] People who have secured abortion, or practice birth control techniques that many equate with that procedure? "Do not abort a child or kill babies."[226]

What about photographers, videographers, and others who wish to or have made "graven" images? "You shall make for yourselves no idols and erect no carved images or pillars, and you shall not place figured stones in your land, to worship at them; for I am the Lord, your God."[227] Magicians, witches, or warlocks? "You shall not practice augury or witchcraft."[228] Fortune tellers? "[T]he divining of the future [is] but a loathsome evil of Satan's doing."[229] What about "thieves, the greedy, drunkards, revilers, [and] robbers, none of whom will inherit the kingdom of God"?[230] Drunkards and gamblers? "They will ask thee about intoxicants and games of chance. Say: 'In both there is great evil as well as some benefit for man; but the evil which they cause is greater than the benefit which they bring.'"[231]

People with significant amounts of possessions or property? "Do not be materialistic."[232] Moneylenders or bankers? "O you who have attained to faith! Do not gorge yourself on usury, doubling and redoubling it – but remain

224. *1 Corinthians* 6:18; *see also 1 Thessalonians* 4:4-5 ("For this is the will of God, your sanctification: that you abstain from fornication; that each one of you know how to control your own body, in holiness and honor, not with lustful passion, like the Gentiles who know do not know God").

225. *The Didache* 2:2. *See* THE DIDACHE: THE TEACHINGS OF THE TWELVE APOSTLES 4 (R. Joseph Owles trans., 2014).

226. *Id.*

227. *Leviticus* 26:1. *See also The Didache* 2:2 ("Do not practice magic.").

228. *Leviticus* 19:26.

229. *Qur'an* 5:90.

230. *1 Corinthians* 6:10.

231. *Qur'an* 2:219.

232. *The Didache* 2:2; *see also Self-Realization* 62, *in* THE BHAGAVAD GITA 96 (Eknath Easwaran trans., 2d ed. 2007) ("When you keep thinking about sense objects, attachment comes. Attachment breeds desire, the lust of possession that burns to anger."); *The Katha Upanishad* 27, *in* THE UPANISHADS 74 (Eknath Easwaran trans., 2d. ed. 2007) ("Never can mortals/Be made happy by wealth. How can we be/Desirous of wealth when we see your face/And know we cannot live while you are here?").

conscious of God, so that you might attain to a happy state."[233] Thieves? "Do not steal," and "[d]o not yearn to possess things that belong to your neighbor."[234]

Restaurant customers who want their meat rare or medium rare? "You shall not eat anything with its blood."[235] Food from the sea that does not have scales or fins, or persons that harvest them?

> Everything in the waters that has fins and scales, whether in the seas or in the streams – such you may eat. But anything in the seas or the streams that does not have fins and scales, of the swarming creatures in the waters and among all the other living creatures that are in the waters – they are detestable to you.[236]

Certain types of clothing? "[N]or shall you put on a garment made of two different materials."[237] What about the immensely popular pre-torn jeans? "[D]o not tear your vestments, or you will die."[238] Women who dress "inappropriately?" "[W]omen should dress themselves modestly and decently in suitable clothing, not with their hair braided, or with gold, pearls, or expensive clothes."[239] Men who wear gold or pure silk? "Islam has . . . prohibited two kinds of adornment for men while permitting them for women. These are, first, gold ornaments and, second, clothing made of pure silk."[240] What about cross-dressing? "A woman must not put on a man's apparel; nor shall a man wear women's clothing; for whoever does these things is abhorrent to the LORD your God."[241] Clean clothes and proper grooming? "Let your clothes always be freshly washed, and your head never lack ointment."[242] Women with perfume? "The woman who

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233. *Qur'an* 3:130; *see also Qur'an* 2:275 ("Those who gorge themselves on usury behave but as he might behave whom Satan has confounded with his touch.").

234. *The Didache* 2.2.

235. *Leviticus* 19:26.

236. *Leviticus* 11:9-10.

237. *Leviticus* 19:19.

238. *Leviticus* 10:6.

239. *1 Timothy* 2:9.

240. YUSUF AL-QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM: AL-HALAL WAL HARAM FIL ISLAM 82 (Kamal El-Helbawy et al. trans., 1994) [hereinafter LAWFUL AND PROHIBITED IN ISLAM].

241. *Deuteronomy* 22:5.

242. *Ecclesiastes* 9:8.

perfumes herself and passes through a gathering is an adulteress."[243]

What about certain haircuts and beards, given that "[y]ou shall not round off the hair on your temples or mar the edges of your beard."[244] Wigs and/or hairpieces? For females, "the addition of any other hair, real or artificial, to one's own hair – that is, the wearing of wigs and hairpieces – is also prohibited."[245] Similar risks lurk for "[m]en [who] are prohibited such things to an even greater degree."[246] Men who shave their heads? "They shall not make bald spots upon their heads."[247] Or bald men? As Elisha went to Bethel, "little boys came out of the town and jeered at him, saying, 'Go away baldhead! Go away, baldhead.'"[248]

Then there are tattoos and body piercings: Neither Christian nor Jew "shall . . . make any gashes in your flesh for the dead or tattoo any marks upon you."[249] In a similar vein, "[t]he Messenger of Allah (peace be on him) cursed the tattooer and the one who is tattooed, the shortener of teeth, and the one whose teeth are shortened."[250] And indeed, attorneys and/or law professors:

> There are ignorant people who speak flowery words and take delight in the letter of the law, saying that there is nothing else. Their hearts are full of selfish desires, Arjuna. Their idea of heaven is their own enjoyment, and the aim of all their activities is pleasure and power. . . . Those whose minds are swept away by the pursuit of pleasure and power are incapable of following the supreme goal and will not attain samadhi.[251]

These are just a few of the myriad possibilities, limited to a quick survey of major religious texts. These alone pose vexing challenges for any rule that would privilege religious beliefs in the face of a public accommodations claim. To take just three

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243. LAWFUL AND PROHIBITED IN ISLAM, *supra* note 259, at 167.
244. *Leviticus* 19:27.
245. LAWFUL AND PROHIBITED IN ISLAM, *supra* note 259, at 90.
246. *Id.* at 91.
247. *Leviticus* 21:5.
248. *2 Kings* 2:23.
249. *Leviticus* 19:28.
250. LAWFUL AND PROHIBITED IN ISLAM, *supra* note 259, at 88.
251. *Self-Realization* 42-44, *in* THE BHAGAVAD GITA, *supra* note 250, at 93.

examples. There are an estimated 1,335,963 "active resident attorneys" in the United States,[252] and approximately 16,900 law professors.[253] Religious beliefs that would justify refusing service to those individuals would have profound implications. A recent survey in turn estimates that four in ten adults between the ages of 18 and 69 have tattoos.[254] Any exemption that would allow a business to refuse service to 40% of the adult American population is, to say the least, significant. And these are just three of the possibilities available under a regime that protects sincere individual religious beliefs, regardless of their origins, and treats all as worthy of respect, even the most outlandish.

CONCLUSION

I do not pretend to have a complete mastery of the complex set of cases and doctrines governing Free Exercise Clause claims. This is my first foray into the field, and it undoubtedly does not do full justice to the pronouncements of the Court and the various theories and approaches that true scholars of the Clause have advanced. My arguably amateur take is, nevertheless, that it is important to consider the implications of any possible rule allowing religious exemptions to public accommodations laws in the light of the teachings of *Frazee* and *Ballard*.

Religion, however defined, and however embraced or rejected, is a central element in American life. As Justice William O. Douglas correctly, albeit controversially observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."[255] Religion can be a tremendous force for good. It can also be, as James Madison observed, a force for

252. *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, A.B.A. (May 11, 2018), [https://perma.cc/2T8K-6P7J].

253. *Occupational Employment and Wages*, U.S. BUREAU OF LAB. STAT. (May 2017), [https://perma.cc/5CDL-2A5P] .

254. Martin Armstrong, *4 in 10 U.S. Adults Have a Tattoo*, STATISTA (June 26, 2017), [https://perma.cc/TEF3-Z9QA].

255. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

evil, given that religion, "[e]ven in its coolest state . . . has been much oftener a motive to oppression than a restraint from it."[256]

The highly deferential standard articulated in *Smith* is almost certainly inadequate to the task of balancing the competing interests posed by a case like *Masterpiece Cakeshop*. As Professors Berg and Laycock have argued, some form of "[h]eightened scrutiny of laws burdening the free exercise of religion would provide a means of protecting the essential interests of both [individuals and groups] and religious dissenters."[257] That is likely true, but poses its own set of problems. Every current form of heightened scrutiny requires drawing lines, the nature and location of which provoke sharp disputes. The Court, for example, has never defined what makes government interests "compelling" as opposed to simply "important."[258] RFRA, in turn, requires that a judicially cognizable burden on a sincerely held religious belief be "substantial,"[259] a limitation that has provoked its own set of disputes and suggestions.[260]

I don't know exactly what that standard should be and how it would operate. I do know that it must be crafted in the light of the reality that each individual has the right to formulate and embrace a sincerely held religious belief, and that it is not within the province of the body politic or the courts to condemn those beliefs as antithetical to dogma or social norms. As Professor Gedicks has emphasized, "[a]s the Court's religious-question precedents make clear, rationality or plausibility . . . is irrelevant; what matters is not whether *the court* finds a claimant's understanding of theological consequences credible,

256. *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON, 1787-1788, 205, 213-14 (Robert A. Rutland et al., eds., 1977).

257. Berg & Laycock Brief, *supra* note 55, at 35-36.

258. As already noted, debates about these two standards have infected discussions in gender discrimination cases. *See supra* text accompanying notes 175-77.

259. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A. (107 Stat.).

260. Professor Gedicks, for example, proposes that courts use "tort and other established bodies of secular law to adjudicate the substantiality of religious burdens." Gedicks, *supra* note 126, at 150. Professor Helfand disagrees, arguing that this "proposed solution . . . misses the entire object of RFRA." Michael A. Helfand, *Identifying Substantial Burdens*, 2016 ILL. L. REV. 1771, 1789 (2016). He argues instead that "to determine whether a law substantially burdens a person's religious exercise, a court might consider whether, by engaging in religious exercise, persons will be subject to some form of civil penalty." *Id.* at 1791.

but whether *the claimant* does."[261] This poses its own set of problems: the risk "that the resulting legal landscape would likely be one in which government laws are pockmarked by constitutionally compelled religious exemptions, causing harm to both legitimate regulatory interests and . . . threatening the rule of law by allowing individuals to become 'laws unto themselves.'"[262]

Further complications lie in the suggestion that in many instances when the Court has recognized and protected free exercise it has "hinted that it would not be so kind to religious views it found less appealing."[263] For example, as Professor Mark Tushnet has observed, "[i]t is not unfair to read [*Yoder*] as saying that the claims of the Amish prevailed because they were a 'good' religion."[264] But that cannot be the law in a regime within which *Frazee* and *Ballard* remain on the books and all beliefs that are sincerely held are entitled to respect, no matter how outlandish they might seem. "Abhorrence of religious persecution and intolerance is a basic part of our heritage."[265] That must be especially so in today's world, for we truly live in "a cosmopolitan nation made up of people of almost every conceivable preference."[266] The Court may wish to search for "circumstances in which individualized exemptions from a general requirement are available."[267] But is it truly appropriate, much less possible, to pick and choose which beliefs get protected, at least as matters stand? Indeed, should religious claims be given favorable treatment, to the exclusion of secular ones? As Professor Marshall has noted, "[c]laims based on

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261. Gedicks, *supra* note 126, at 130-31.

262. William P. Marshall, *Bad Statutes Make Bad Law*: Burwell v. Hobby Lobby, 2014 S. Ct. Rev. 71, 103 (2014) (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990)).

263. *See* Nicholas J. Nelson, *A Textual Approach to Harmonizing* Sherbert *and* Smith *on Free Exercise Accommodations*, 83 Notre Dame L. Rev. 801, 811-12 (2008).

264. Mark Tushnet, *Of Church and State and the Supreme Court:* Kurland *Revisited*, 1989 Sup. Ct. Rev. 373, 381-82 (1989). *See also* Helfand, *supra* note 279, at 1788 ("Courts are predisposed to favoring religious majorities, whose religious practices are more well-known and respected, as opposed to religious minorities, whose religious practice are more obscure.").

265. Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

266. United States v. Lee, 455 U.S. 252, 259 (1982) ((quoting *Braunfeld*, 366 U.S. at 606) (internal quotation marks omitted)).

267. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

religion are not entitled to judicially created exemptions from laws of general applicability unless such exemptions are available to those manifestations of secular ideas as well."[268]

Various proposals have been advanced, from a blanket embrace of *Smith* to its repudiation and the protection of all religious beliefs. In most instances, proponents of change advocate for some sort of "balancing" or "weighing" of the competing interests of the religious adherent and the body politic that has condemned discrimination on the basis of various group identities.

Professor Steven Smith, for example, has suggested one possible approach, stating that:

> [G]overnment should not lightly impose burdens on the exercise of anyone's religion, but if government is not merely being insensitive but instead has solid and legitimate reasons for declining to exempt religious objectors from complying with a general law, courts should defer to such democratic judgments.[269]

The general assumption is that in order "[t]o maintain an organized society the guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[270] So, for example, I assume that there is a general consensus—based on "solid and legitimate" reasons—for the democratic judgment that discrimination on the basis of race and gender cannot be tolerated in the name of the "common good."[271] But what do we do when the field of inquiry and

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268. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 547 (1983). The reflexive response to this argument is that religion is special in the light of the Free Exercise guarantee. That notion does not account, however, for the problems posed by the Establishment Clause, which counsels against granting religion a preferred position. For an example of the tensions posed, compare United States v. Seeger, 380 U.S. 163, 166, 187 (1965) with Welsh v. United States, 398 U.S. 333, 337-38, 343 (1970) which focus on religious qualifications for conscientious objector status.

269. Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2041-42 (2011).

270. *Lee*, 455 U.S. at 259.

271. But see Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1015 (E.D. Wis. 2002), where the court held that Creativity, "the central tenet of which is white supremacy," is a religion. *See* discussion *supra* notes 111-15 and accompanying text. In important respects, the court's analysis focused on "the religious claimants'

dispute expands exponentially, as it inevitably must in our multicultural, pluralistic society? On what bases do we draw the lines? How do we explain to those who believe something with all their heart and soul that these deeply personal and meaningful principles must yield in the face of a general public commitment to nondiscrimination? In particular, how do we respond when the belief in question is clearly protected, even though it is "not acceptable, logical, consistent, or comprehensible to others."[272]

As indicated, Jack Phillips is not a member of a formal church. He is simply someone who has read the Bible and found within its pages a command to neither participate in nor facilitate same-sex marriages. Those claims have attracted considerable support. They track closely ones embraced by some mainstream religions and their adherents.[273] They also resonate within segments of the population that are appalled by the existence of gay, lesbian, bisexual, and transgender individuals, much less the notion that they are entitled to protection under measures barring discrimination in places of public accommodation. These claims have, accordingly, an appeal that differentiate them from, for example, the naked assertion that an individual appearing in court must don his "spiritual attire," in that instance, to dress like a chicken.[274]

That said, how will we respond to the myriad examples of religious mandates I have identified in this article? These proscriptions are found in readily-accessible religious texts that, if embraced, provide the bases for refusing service to literally millions of individuals?

The claims that have garnered the most attention to date are those made by individuals like Jack Phillips, who asserts a right to refuse service to individuals sharing characteristics—sexual identity—whose legal significance and treatment remain matters

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understanding." *See supra* note 126 and accompanying text. The court fashioned a result that those arguing for that possible standard would almost certainly reject.

272. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

273. Joanna Piacenza & Robert P. Jones, Ph.D., *Most American Religious Groups Support Same-sex Marriage, Oppose Religiously Based Service Refusals*, PUB. RELIGION RES. INST. (Feb. 3, 2017), [https://perma.cc/6HMQ-VDXL] The survey identified three major religions as opposed: Jehovah's Witnesses, 53%; Mormons, 55%; and White evangelical Protestants, 61 %.

274. *See* State v. Hodges, 695 S.W.2d 171 (Tenn. 1985).

of intense dispute in the courts and the body politic. Any holding recognizing a right to discriminate on the basis of sexual orientation would be significant and viewed with applause or alarm, depending on which side of that contentious divide one lies. But the effects of such a ruling cannot and should not be confined to such claims. It would also inevitably invite other individuals to test the judicial waters, to, for example, refuse to serve any or all of the myriad populations I have uncovered that are subject to religious condemnation. Beards?[275] Torn clothing?[276] Tattoos or piercings?[277] Attorneys, or even law professors?[278]

A slice of Pandora's Cake, anyone?

275. *Leviticus* 19:27.
276. *Leviticus* 10:6.
277. *Leviticus* 19:28.
278. *See supra* note 270 and accompanying text.

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